No. 85-159

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

ALVIN J. REMMENGA and SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the California Court of Appeal,
Second Appellate District, Division Six

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The California Coastal Commission, appellee herein, respectfully moves this Honorable Court to dismiss the appeal now pending or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six on the following grounds:

(a) The questions on which decision of the cause depends are insubstantial and do not require further argument. The same issues have already been presented to this Court in the relatively recent appeals of *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al.*, (1971) 404 U.S. 878 and *Jordan et al. v. Village of Menomonee Falls*, (1966) 385 U.S. 4. In each case, the appeal was dismissed for want of a substantial federal question;

(b) The questions presented are so dependent upon a unique factual situation that any substantive significance they might have is too isolated and circumscribed to benefit anyone but Hollister Ranch property owners. (*Rice v. Sioux City Cemetery* (1954) 349 U.S. 70, 74.) Moreover, the statutes under attack in this appeal are part of a regulatory scheme which, in addition to requiring in lieu fees, also authorizes payment of compensation. (See Cal. Pub. Resources Code, § 30610.3; Decision, Juris. Statement, Appen. A, pp. A-23 — A-25.) This regulatory scheme has not yet run its course. Hence, appellants' taking claim is likely premature. (*Williamson Planning Comm'n. v. Hamilton Bank* (1985) __ U.S. __ [105 S.Ct. 3108].)

STATEMENT OF THE CASE

This appeal is an attack on statutes designed to preserve a public right of access to the sea guaranteed by a state constitution.

Under article X, section 4 of the California Constitution,[1] no upland owner may interfere with the public's right of access to the sea. To ensure this constitutional right is fully protected, the California Legislature is empowered to enact all laws necessary to make public access forever attainable.

Reacting to numerous government studies and the fears expressed by the electorate in an initiative measure,[2] the California Legislature saw the inexorable intensification of land uses in proximity to the state's shoreline as a process which threatened to make state tidelands the private preserve of a select few. To carry out its constitutional responsiblity to prevent the public's exclusion from these lands, the Legislature enacted section 30212 of the California Coastal Act of 1976, section 30000 et seq. of the California Public Resources Code ("Act"). This provision is applied during the process of issuing development permits and requires that certain projects provide public access from the nearest public roadway to the shoreline and along the coast.[3] However, also included within

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[1] Article X, section 4 provides in pertinent part:

> "No individual, partnership, or corporation claiming or processing the frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

[2] In 1972, the People of California approved Proposition 20 as an initiative measure and thereby enacted into law the California Coastal Zone Conservation Act, section 27000 et seq. of the California Public Resources Code. This act was designed, in part, to protect public access to the coast.

[3] Section 30212 provides in pertinent part as follows:

> "Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects . . . ."

the Act are three specialized provisions designed by the Legislature as mechanisms for achieving the public access requirements of section 30212 in areas where complicated ownership patterns prevent developers from quickly meeting these requirements. (See §§ 30610.3, 30610.6 and 30610.8; Juris. Statement, Appen. H.) It is the validity of these specialized provisions which is at issue in this appeal.

The first provision is section 30610.3. It requires the payment of in lieu fees for the purpose of acquiring accessways in an area where the developer does not, by himself, own the property which would otherwise be required for access, but rather shares such ownership in common with others. In essence, individual property owners provide their fair share of the funds necessary to purchase or condemn the required accessways and are then reimbursed when the property is purchased or condemned.[4] In this fashion roughly the same result is achieved as if the original subdivider had been required to provide accessways to and along the sea in the subdivision.

The second provision is section 30610.8. It sets the in lieu fee required by section 30610.3 at $5,000 for developers in the Hollister Ranch. Normally an in lieu fee under section 30610.3 would be determined by dividing either the negotiated purchase price of the accessways or their estimated appraised cost for condemnation purposes by the total number of lots involved. However, in appellants' case, it was set by the Legislature, in section 30610.8 of the Act, after the association representing appellants and other owners sought to block implementation of section 30610.3 by refusing, among other things, to allow government appraisers entry to the area.

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[4] It should be noted that some property owners will be reimbursing the state rather than vice versa. For example, if the state purchases or condemns access easements before a property owner is ready to develop, then the owner will receive compensation *before* being required to pay the in lieu fee.

The third provision is section 30610.6.[5] This section was enacted by the Legislature to settle a "lengthy and bitter dispute" over the public access requirements of the Act between the state and property owners in another coastal subdivision, known as "the Sea Ranch."[6] Under the terms of this compromise, the property owners agreed to settle all outstanding disputes with the state and to immediately provide dedicated public accessways. In turn, the state agreed to pay the owners $500,000. Appellants have neither asked for nor been denied an opportunity to settle their dispute with the state on the same or a similar basis. Indeed they have rejected all settlement proposals to date.

Appellants challenged the constitutionality of sections 30610.3 and 30610.8 in the California courts on the grounds they constituted a taking of property and a denial of equal protection of the laws. The California Court of Appeal rejected both contentions. Citing numerous government studies demonstrating public ". . . tidelands have been walled off from public access by private development," it held no taking had been shown because:

> ". . . the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access. . . ." (Decision, Juris. Statement, Appen. A, p. A-8.)

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[5] Appellants do not challenge the validity of section 30610.6; rather they assert that its existence gives rise to their equal protection claim against sections 30610.3 and 30610.8.

[6] The enactment of section 30610.6 and the Sea Ranch owners' compliance with its terms was the basis of this Court's decision to remand an appeal of the three-judge district court decision in *Sea Ranch Ass'n v. California Coastal Com'n* (N.D. Cal. 1981) 527 F.Supp. 390, 396. (See 454 U.S. 1070, Memorandum No. 81-335 so that the district court could determine whether the decision had been rendered moot.) In its initial decision, the district court had upheld the constitutionality of imposing access conditions in the Sea Ranch.

Similarly, the court found no denial of equal protection in the Legislature's imposition of the in lieu fee set by section 30610.8 where appellants had refused to settle their dispute with the state on the basis of section 30610.6. As the Court held:

> "The Legislature does not run afoul of the equal protection clause when faced with two parties challenging the same requirements, it agrees to settle the litigation with one party and continues the [*sic*] litigate with another who has refused to agree to the same or a similar compromise." (Decision, Juris. Statement, Appen. A, p. A-12.)

I.

THE ISSUES PRESENTED BY THIS APPEAL ARE SO RUDIMENTARY AS TO REQUIRE NO FURTHER ARGUMENT

Appellants' attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this Court has concurred either by express holdings or through the dismissal of prior appeals. Thus, their appeal raises issues so rudimentary as to require no further argument.

In *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al., supra*, 404 U.S. 878, this court concurred with a California Supreme Court decision upholding the constitutionality of an in lieu fee statute where the statute's basis was a legislative perception that the cumulative affect of projects subject to the fee would be adverse to a public constitutional right. Despite this fact, appellants insist that a statutory exaction may not be imposed on a developer unless the proposed project, in and of itself, immediately creates the need for an exaction. (Juris. Statement, p. 11.) Similarly, this Court has repeatedly held that a legislature's factual determinations supporting a statute under

constitutional attack may not be judicially questioned if the Legislature could reasonably believe them to be true. (*Radice v. New York* (1924) 264 U.S. 292; *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49; *Vance v. Bradley* (1979) 440 U.S. 93; *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456.) Yet, appellants insist the California Legislature must have judicially verifiable proof projects will adversely affect public access before an in lieu fee may be required. (Juris. Statement, p. 14.)

Finally, despite the fact there is a strong policy in federal law favoring settlement of litigation (see *Marek, et al., v. Chesny, Individually and as Administrator of the Estate of Chesney* (1985) __ U.S. __ [105 S.Ct. 3012]; *Firefighters Local Union No. 1784 v. Stotts, et al.* (1984) __ U.S. __ [104 S.Ct. 2576]; *Belknap, Inc. v. Hale* (1983) 463 U.S. 491), appellants assert that the goal of terminating litigation does not provide a rational basis for distinguishing between persons subject to suit under the same statute. Instead, they contend the equal protection clause requires government to reject settlement of any suit to enforce a statute unless all persons subject to suit under it agree to the same settlement. Indeed, in appellants' view, the penalty for government's failure to reject a settlement under such circumstances is loss of the ability to continue enforcing the statute against those rejecting the compromise.

Such arguments are so specious as to merit no further consideration by this Court.

A. The California Legislature Could Reasonably Believe the Cumulative Impact of Projects Similar to Appellants' Would Adversely Affect Public Access. Thus, the Statutory Imposition of an Access Condition Is Valid

The Court of Appeal's decision holds unconstitutional any permit condition requiring an applicant to donate property for a

public use that bears no relationship to the burden imposed on the public by the applicant's project. (Decision, Juris. Statement, Appen. A, pp. A-3 — A-4.) However, if a rational relationship between the condition imposed and the appellant's proposal is made apparent, the condition will be upheld. (*Id.*, at p. A-4.)

i. Exactions May Be Required From Projects Which Cumulatively As Opposed to Immediately Create the Need for the Exaction

Under the California Supreme Court's decision in *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, this relationship may be established whether or not the project, in and of itself, immediately creates a burden on a public right. Instead, justification for the condition may come from the cumulative impact many such projects will have in the future. As the court held in that case:

> "We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required." (*Id.*, at pp. 639-640.)

In stating this rule, the California Supreme Court did no more than recognize the obvious fact that though the impact of any project may be small or even negligible, those impacts when repeated again and again may have a substantial if not devastating impact

on the public welfare. Thus, it held the public need not remain helpless and defenseless against piecemeal assaults on its rights and interests. (See also, *Jordan v. Village of Menomonee Falls*, (Wis. 1965) 137 N.W.2d 442 where the Wisconsin Supreme Court likewise accepted cumulative impacts as the basis of an in lieu fee statute.)

As noted above, by its dismissal of the appeals in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al., supra*, 404 U.S. 878; and *Jordan et al. v. Village of Menomonee Falls, supra*, 385 U.S. 4, this Court concurred.

ii. Judicial Examination of a Statute Under Constitutional Attack Is Complete When It Appears the Legislature Could Reasonably Believe the Facts Supporting the Statute Are True

The Court of Appeal also correctly recognized that a legislative determination of the existence of a threat to the public welfare need not be supported by judicially verifiable proof. (Decision, Juris. Statement, Appen. A, p. A-7.) Instead, judicial review of a statute under constitutional attack is complete when it appears the Legislature could reasonably believe the facts underpinning the regulation are true. (*Vance v. Bradley, supra*, 440 U.S. 93.)

This Court has repeatedly affirmed this rule. In *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. 49, the following principles were expressed:

> "But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind

of state regulation is 'impermissible.' We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. Mr. Justice Brennan, speaking for the Court in *Ginsberg v. New York*, 390 U.S. 629, 642-643 (1968), said: 'We do not demand of legislatures "scientifically certain criteria of legislation." *Noble State Bank v. Haskell*, 219 U.S. 104, 110.' Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. [Citations omitted.]

"From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. [Citations omitted.] The same is true of the federal securities and antitrust laws and a host of federal regulations. [Citations omitted.] On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce. [Citations omitted.] . . . .

"*Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or*

> *through an existing park or wilderness area. . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.*" (*Id.*, at pp. 60-62; emphasis added.)

Similarly, in a case involving the equal protection clause this Court held:

> "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' *Vance v. Bradley*, 440 U.S., at 111. See also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952); *Henderson Co. v. Thompson*, 300 U.S. 258, 264-265 (1937)." (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at p. 464.)

As noted by this Court in *Vance v. Bradley, supra*, 440 U.S. at page 111, a federal court's:

> "'. . . responsiblity for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation"' *Firemen v. Chicago, R. I. & P. R. Co.*, 393 U.S., at 138-139."

iii. Government Studies Provided the Legislature With Reason to Believe the Cumulative Impact of Projects Such As Appellants' Would Adversely Affect Public Access

In the present case, the Court of Appeal concluded the Legislature had good reason to believe the cumulative impact of projects such as appellants' would adversely affect the public's constitutional right of access. Citing numerous government studies demonstrating that hundreds of miles of publicly owned tidelands had been walled off from public access by private development, the Court held:

> ". . . the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast, in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access. . . ." (Decision, Juris. Statement, Appen. A, p. A-8.)

Government studies such as these have traditionally been regarded as sufficient support for statutes under constitutional attack (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at p. 459.) Indeed, in this case, the Legislature was compelled by law (see former Cal. Pub. Resources Code, §§ 27300 et seq., repealed January 1, 1977) to consider the conclusions of a specific study, the California Coastal Plan, which found that:

> "Along the immediate shoreline homes, businesses and industry have often cut off existing public access to the coastline, have used up available road capacity and off street parking and precluded use of the coastline area for recreation. . . ." (*Id.*, at p. 153.)

In short, consistent with long established principles of constitutional law, the Court of Appeal upheld the constitutionality of the in lieu fee at issue based on its recognition the Legislature could reasonably believe the cumulative impact of projects similar to appellants' would adversely affect the public's constitutional right of access.

B. The California Legislature Had a Rational Basis for Settling With the Sea Ranch Owners While Continuing to Litigate With Appellants. Thus, No Equal Protection Violation Occurred

When, as here, a nonfundamental right is at issue, the equal protection clause requires government to have a rational basis for creating classifications among persons subject to its control. (*New Orleans v. Dukes* (1976) 427 U.S. 297, 303.) The classification must be appropriately designed to further a proper governmental goal (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at 461-462) and it must appear that the Legislature could reasonably believe the facts supporting the classification are true. (*Id.*, at p. 464.)

Here, the California Legislature distinguished between those individuals who wished to continue litigating over the validity of section 30610.3 of the Act and those who did not. As noted by the Court of Appeal, the Legislature's reasons for doing so were founded in the desire to terminate very costly litigation, to eliminate the time, effort and administrative expense of processing hundreds of individual permit applications, and to actually realize public access far sooner than might otherwise have been the case were the procedures set forth in section 30610.3 fully followed. (Decision, Juris. Statement, Appen. A, p. A-10.)

The goals of settling litigation, saving public dollars and achieving access to public tidelands are manifestly proper governmental objectives. Despite the fact they had the burden to do so

(*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at 464), appellants failed to demonstrate the Legislature could not reasonably beleive the settlement set forth in section 30610.6 of the Act would accomplish these ends.

For these reasons, appellants' equal protection claim is patently untenable.

II.

APPELLANTS' FIFTH AMENDMENT CLAIM IS LIKELY PREMATURE AND ITS RESOLUTION WOULD BENEFIT NO ONE BUT HOLLISTER RANCH OWNERS

As discussed above, appellants' Fifth Amendment claim does not warrant further review. However, even were further consideration appropriate, the questions presented are so dependent upon a unique factual situation that any substantive significance they might have is too isolated and circumscribed to benefit anyone but Hollister Ranch property owners.

In *Rice v. Sioux City Cemetery, supra*, 349 U.S. 70, this Court held it does not sit to "satisfy a scholarly interest" in "intellectually interesting" problems. Likewise, it does not sit ". . . for the benefit of . . . particular litigants." (*Id.*, at p. 74.) Instead, the Court's attention is reserved for issues of special importance which transcend the "academic or episodic." (*Ibid.*)

As discussed above, sections 30610.3 and 30610.8 are specialized measures designed to facilitate the application of a more general provision to a unique factual setting. Section 30610.3 has not been applied elsewhere in California and, by its terms, section 30610.8 applies solely to the Hollister Ranch. Moreover, it is unlikely that the combination of circumstances which called forth these regulations will be repeated anywhere else.

Furthermore, the statutes under attack in this appeal are part of a regulatory scheme which, in addition to requiring in lieu fees, also authorizes payment of compensation. The portions of this process which allow for the payment of compensation have not yet been completed. Thus, it is presently unclear what the ultimate impact on appellants may be. For this reason, appellants' taking claim is likely premature under the rule recently enunciated in *Williamson Planning Comm'n v. Hamilton Bank, supra*, __ U.S. __ [105 S.Ct. 3108]. In that case this Court held that a property owner must first demonstrate that state procedures for obtaining compensation are unavailable or inadequate before a claim under the Fifth Amendment may be brought.

CONCLUSION

The constitutional issues raised by appellants need no further review by this Court. Contrary to their belief, the police power is available to protect the public against piecemeal as well as wholesale assaults on its constitutional rights. Similarly, despite appellants' contention, no court has the power to insist a legislature present judicially verifiable proof to support its view that a threat to the public welfare exists. Finally, nothing in the equal protection clause bars government from terminating suits with those who wish to compromise while continuing litigation with those who do not. Thus, the decision of the Court of Appeal should be affirmed without further argument.

In addition, even if appellants' taking claim were to be considered substantial, its significance is isolated to a narrow set of facts and, thus, does not warrant this Court's attention. Finally, because the compensatory aspects of the regulatory scheme under attack have not yet been completed, appellant's taking claim may

well be premature. For these reasons their appeal should be dismissed.

Respectfully submitted,

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Appellee.

I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, Sept. 23, 1985.

PETER H. KAUFMAN

Subscribed and sworn to before me
this 23rd day of September 1985.

Brenda J. Locke

Notary Public in and for said County and State

OFFICIAL SEAL
BRENDA J. LOCKE
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp. Feb. 20, 1988